United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1012

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

GRACE "SIMMONS" [MORRIS],

Defendant/Appellant.

B
P/s

No. 77-1012

On Appeal From the United States District Court
For the Southern District of New York
(No. 75 Cr. 504, Hon. Edmund L. Palmieri, presiding)

BRIEF FOR APPELLANT

~~Copy~~
2 copies received
A. Strauss
A.U.S.A.
1/24/77

AARON J. JAFFE
401 Broadway
New York, New York 10013
(212) 966-6790

Attorney for Appellant

On The Brief:
FREDRIC J. GROSS

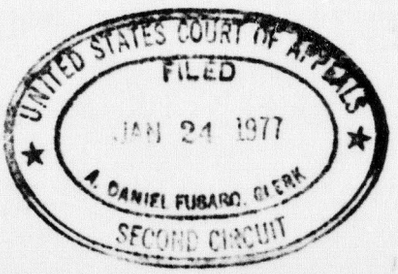

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Other Authorities

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against - No. 77-1012

GRACE "SIMMONS" [MORRIS],

Defendant/Appellant.

On Appeal From the United States District Court
For the Southern District of New York
(No. 75 Cr. 504, Hon. Edmund L. Palmieri, presiding)

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Grace Morris, appellant herein (known to the Grand Jury as Grace "Simmons"), Benny Johnson, and Salena Hicks were indicted in the Southern District of New York for conspiring between October 1973 and May 1975 to distribute heroin (Count I; 18 U.S.C. 371) and for distributing heroin on three specified dates (Counts II, III, IV; 21 U.S.C. 841). The indictment, Number 75 Cr. 504, was not returned until May 27, 1975, although the last alleged act was committed in January, 1974. The reason for the delay is suggested in the affidavit of Assistant United States Attorney Engel (App. A-5] ; hereafter, "Engel Affidavit"): Federal authorities were content to defer

to State prosecution until it was learned that wiretaps might be suppressed in the State courts. Engel Affidavit ¶8.

Before the case was presented to the Grand Jury, AUSA Engel reached an understanding with defendant Johnson and his attorney: Johnson would plead guilty to one count and then would testify against appellant. Id. ¶¶9, 10. This agreement was honored, and accordingly the case against Johnson was severed.

At an uncertain time between the dates of the charged offenses and the time of indictment, defendant Hicks went insane. Appellant moved to dismiss the indictment because of the prosecution's sixteen month delay in presenting the case to the grand jury. Counsel's affidavit specified prejudice flowing from the delay in that Ms. Hicks, if sane, would have given generally exculpatory testimony. More particularly, Ms. Hicks would have testified that Benny Johnson had stated he was "in trouble with the Feds and was going to get them somebody by hook or by crook." Mitchell Reply Affidavit, App. A-11, 12. With Ms. Hicks' loss of rational functions, her testimony was lost to appellant.

In an opinion dated November 18, 1975, Judge Metzner (who presided over all pretrial proceedings), after analyzing and rejecting the prosecution's arguments in opposition to the motion to dismiss, wrote:

> While the case presents strong appeal for dismissal, because of the peculiar fact situation, I am of the opinion that the matter be held in abeyance for a time. The government is directed to have defendant Hicks examined by Dr. Portnow during the month of June 1976. The motions are denied without prejudice to renewal

after receipt of Dr. Portnow's report after examination. [App. A-17, 20]

Dr. Portnow thereafter reported that defendant Hicks was not fit to defend or to testify, and was unlikely to regain competency during the foreseeable future. On October 6, 1976 appellant renewed the motion to dismiss. App. A-21. By written opinion dated and filed before the return date of the renewed motion, Judge Metzner held:

> The motion for dismissal because of pre-indictment delay is denied. Defendant Simmons has not furnished any information other than that given to the court in connection with the original motion. That motion was denied by opinion dated November 18, 1975. [App. A-22].

Defendant Hicks' case was severed (id.), and appellant was ordered to stand trial alone. The case was immediately reassigned to Judge Palmieri, and trial commenced the following Monday, October 18, 1976.

The evidence at trial was quantitatively and qualitatively minimal. Benny Johnson testified that he worked at Singleton's, a bar patronized by the less savory elements. When patrons sought heroin, he referred them to Salena Hicks, a coworker. To his delight, Hicks kicked back to him $100 for each ounce of heroin merchandised.[1]

---

1. The only transactions Johnson specifically identified were those charged in the substantive counts. Johnson's specificity appears to have been a reflexive instant replay of the prosecutor's leading questions. If the prosecutor recited a date, Johnson would deliver his spiel concerning that date. On cross, however, Johnson conceded he had no certainty as to these dates, and no special mnemonic aid -- beyond the prosecutor's lead -- that suggested any particular date. Compare T.43-49 with T.60-64.

Hicks told Johnson that appellant could service his customers when Hicks couldn't be reached.

Johnson's testimony, if credited, would establish the existence of a continuing conspiracy. It also described an ambience and a general pattern of criminal behavior against which the jury would measure William Brown's testimony.

William Brown became a paid DEA informant after being arrested as a non-addict street dealer. He appears to have been Benny Johnson's best customer.[2] For assisting Johnson in the Byzantine process of transporting customers, contraband and cash in proper cadence, Brown was rebated half of each Hicks kick-back. T.43,44. But see T.84. At all pertinent times, Brown was wired with a Kel set (radio transmitter), but none of the resulting tapes was incriminating as to appellant. Brown was also under almost-constant surveillance by DEA agents. Curiously, the only times they didn't see him were when he entered public bars and assertedly made buys. In consequence, GX-1 and GX-2 can be traced to the conspirators only on Brown's say-so. Count II is supported by GX-1, which Brown described as an ounce of heroin he got from appellant. Count III is supported by GX-2, another ounce which Brown obtained from Hicks. The government conceded and the court held (T.407) that Count IV, which rests on a two-ounce buy, GX-3, can only yield a conviction

---

2. Indeed, he might have been Johnson's only customer. Where Johnson described in general terms the types of occurrences which characterized Singleton's, Brown later testified that he was a party to specific instances of those occurrences.

on a Pinkerton theory: the acts of each conspirator implicate all in every substantive offense. See Pinkerton v. United States, 328 U.S. 640 (1946).

Various DEA special agents testified to their surveillance efforts, and a forensic chemist described his analyses of GX-1, -2 and -3. The only remarkable elements of Mr. Manning's testimony are the net weights: GX-1, 20.53 grams; GX-2, 21.24 grams; GX-3, 36.19 grams. By the time four ounces of bought powder reached the laboratory, it had suffered a 30% shrinkage.[3]

Appellant took the stand on her own behalf and denied everything. The prosecution presented a lengthy rebuttal.

On October 21, the jury returned guilty findings on all counts, and appellant was remanded. On December 2, appellant's renewed motion to dismiss (T.557) was apparently denied, for she was sentenced to concurrent 8 year terms on the first three counts, a consecutive five year term on the final count suspended in favor of probation,[4] five years of Special Parole (21 U.S.C. 841) following completion of probation, and fines of $2,000 on each count.

A notice of appeal was timely filed. Jurisdiction to hear the appeal is conferred by 28 U.S.C. 1291. Those

---

3. From Johnson's graphic depictions (T.70-71, 347-51), in the world of Singleton's Bar, anyone who dealt 30% short-weight would soon have the top 30% of his or her body separated from the bottom.

4. The reason for this treatment was the shared concern of Court and prosecutor that the Special Parole provisions of 21 U.S.C. 841(c) had no consequence. See T.554-55. Neither understood the plain language of the statute which specifies that infractions committed during a period of Special Parole generate an additional sentence equal to the parole period.

further facts necessary to resolution of the questions presented are related in the Argument, post.

QUESTIONS PRESENTED

1. When a motion to dismiss for pre-indictment delay has been denied without prejudice to renewal if an important defense witness remains incompetent, and almost a year later the court is advised that the witness will not be fit to testify, is it arbitrary and capricious to deny the renewed motion solely on the grounds that no additional evidence has been furnished?

2. Did the court below err in refusing to grant a motion to dismiss where pre-indictment procrastination was not merely unreasonable, but was intentional and designed to harass, and where substantial prejudice coincidental to the delay was visited upon the defense through loss of a key witness?

3. What remedy is appropriate when the trial assistant intentionally misled the jury so as to enhance the credibility of an essential prosecution witness?

4. Is the introduction of fungible narcotics exhibits precluded where the chains of custody lack numerous links respecting persons, dates, methods of conveyance and conditions of storage?

ARGUMENT

Point One: Judge Metzner's Denial of the Renewed Motion to Dismiss Was Arbitrary and Capricious Because He Overlooked the Only New Fact Which His Prior Decision Contemplated: Salena Hicks' Continuing Insanity.

Judge Metzner's original opinion on the motion to dismiss for pretrial delay (App. A-17), rendered after submission of affidavits and briefs by prosecution and defense, clearly rejected the excuses and arguments brought forward by the government. His ruling at that time may fairly be characterized as holding that unreasonable delays in prosecution may reflect either bad faith or bureaucratic bumbling. If the former, dismissal is required; otherwise, prejudice must be shown. He necessarily considered the delays to be unreasonable[5] because he reached the question of prejudice.[6]

---

5. There can be no serious dispute as to the unreasonableness of the delays. Lesser delays attended by more substantial reasons were deemed unreasonable by the trial court and all three appellate judges in United States v. Quinn, 540 F.2d 357 (8th Cir. 1976).

6. If the government's account of the delays established that they were reasonable, Judge Metzner would not have reached the question of prejudice. The statute of limitations is a defendant's sole protection against that prejudice which is incidental to wholly legitimate delays.

Consistent with the rule in United States v. Marion, 404 U.S. 307, 326 (1971), Judge Metzner refused to make a premature finding of prejudice when there remained a real possibility that Salena Hicks' sanity would be restored. In that event, her testimony would be available to appellant at trial, and no cognizable prejudice would flow from the prosecution delays. Judge Metzner allowed a period of eight months, at the end of which time a psychiatric report on Ms. Hicks' condition would be received. He denied the motion to dismiss "without prejudice to renewal after receipt of Dr. Portnow's report...."

When Dr. Portnow's report was received, it became clear that Salena Hicks' insanity precluded her testifying on behalf of appellant. The previously speculative claim of prejudice took on substance. Pursuant to the invitation contained in Judge Metzner's original opinion, appellant's counsel served notice that he would move on October 13, 1976 for dismissal. Without waiting for the Government's response, Judge Metzner denied the renewed motion on October 12, 1976.[7] The sole basis for his denial was that "Defendant Simmons has not furnished any information other than that given to the court in connection with the original motion [t]hat was denied...." (App. A-22).

The denial of the renewed motion is nothing less than arbitrary and capricious. The original ruling contemplated

---

7. Immediately thereafter, Judge Metzner ordered this case reassigned for trial. Trial commenced the following Monday before Judge Palmieri.

Dr. Portnow's 1976 report as the only new evidence essential to a final disposition of a "case [that] presents strong appeal for dismissal." The conclusion is inescapable that the court originally intended to grant appellant relief unless Salena Hicks had regained competency to testify. Judge Metzner had not placed upon the defense any burden to produce new information beyond that contained in Dr. Portnow's court-ordered report. For Judge Metzner to discount that report as not "furnish[ing] any information other than that [previously] given to the court," he had to misconstrue his prior ruling. He acted as though the original motion was inadequately supported. But the reserved question had been whether prejudice would be realized at trial by reason of Ms. Hicks' continuing incompetency.

Perhaps Judge Metzner changed his mind. To be sure, any judge is free to change his mind. But when he does so, he owes an explanation. Explanation serves a number of salutary purposes. It allows the litigants an opportunity to address any error in the revised determination; it provides a reviewing court with an illuminated rather than an opaque record, cf. Will v. United States, 389 U.S. 90, 106-07 (1967); it conveys to the public the appearance of reasoned justice. Cf. Reid v. Covert, 354 U.S. 1, 65 (1956) (concurring opinion of Mr. Justice Harlan, explaning his decision to change his vote upon reconsideration).

There is no reason to believe Judge Metzner changed his mind. His denial of the renewed motion does not evidence any

reassessment of his prior ruling. Rather, he appears to have acted hastily, in anticipation of his relinquishing of the case. There is no indication of careful review of his prior decision or the affidavits and arguments to which it responded. Put differently, his denial of the renewed motion was arbitrary and capricious. Because appellant did come forward with the information upon which Judge Metzner had contemplated dismissal, his denial of the motion for failure to produce that information requires reversal.

Point Two: Dismissal for Pretrial Delay Should Be Granted Where Either Prong of the Marion Test Is Satisfied; Here, Both Prongs Were Satisfied.

In United States v. Marion, 404 U.S. 307 (1971), the Supreme Court reversed a dismissal for staleness of an indictment brought within the period of limitations. Addressing the question of fairness -- due process -- the Marion Court observed that "no prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." 404 U.S. at 325. The Court pointed out that assessing actual prejudice before trial would be premature and speculative; trial developments might later demonstrate actual prejudice to the defense.

404 U.S. at 326.[8]

Whether a Marion motion, to prevail, must establish both intentional delay and prejudice, or whether intentional delay alone -- if strategically motivated -- is enough, remains an open question. United States v. Vispi, __ F.2d __, Slip 513, 517 n.4 (No. 76-1250, 2d Cir. 1976); United States v. Finkelstein, 526 F.2d 517, 525-26 (2d Cir. 1975), cert. denied, 96 S.Ct. 1742 (1976); see also United States v. Quinn, 540 F.2d 357, 360 n.2 (8th Cir. 1976). Appellant would urge the correctness of Judge Metzner's 1975 ruling in this case: either a showing of prejudice or a showing of intentional prosecutorial misconduct will support dismissal. But the court need not reach that question, because appellant has been the victim both of purposive, bad faith delay, and of concomitant evidentiary prejudice.

Judge Palmieri was probably oblivious to the case history, and the arbitrary nature of Judge Metzner's second ruling. If so, Judge Palmieri remains oblivious to this day. When counsel renewed the motion prior to sentencing, Judge Palmieri asked no questions and gave no answers. He never denied the motion; he simply ignored it and meted out a sentence.

---

8. Marion was a constitutional decision. There also exists a supervisory power to dismiss with prejudice for delaying prosecution, even in the absence of a constitutional violation. United States v. Furey, 514 F.2d 1098, 1103 (2d Cir. 1975).

(A) The Delay In Indictment Was Intentional Within the Meaning of Marion.

The Engel Affidavit establishes that the prosecution intentionally stayed its hand in favor of State proceedings. Engel notes the more severe State penalties. He does not do that gratuitously; it is the reason for Federal inaction.

The Engel Affidavit further establishes that the decision to move forward with the federal prosecution was made for fear the State prosecution would be lost. Although federal informants and undercover agents participated in an investigation completed sixteen months before indictment, and the case entered the United States Attorney's Office ten months before indictment, a federal indictment was only sought when "it became apparent" that wiretap evidence would be suppressed in the State courts.[9] Engel Affidavit ¶8.

The Engel Affidavit commands the conclusion that the delay in prosecution was intentional. It sets out a prima facia case for all of the elements of the common law tort of abuse of process. An initial intent to defer to State prosecution was altered only when the State prosecutor ran into trouble. The true purpose of the federal prosecution

---

9. In fact, the wiretaps were initially suppressed, but thereafter the suppression order was "resettled." This permitted prosecution of certain defendants, including appellant. During the period allowed for preparation of this Brief, appellant has been on trial in the State court for substantially the same offenses tried in the court below.

was to vindicate the State prosecutor, who appeared to be unable to adequately protect his own interests. The federal prosecution, being premised on undesired developments in the State courts, was brought for purposes of harassment.

The Department of Justice has a formal policy against federally pursuing cases in which substantially the same charges have been aired in State courts. Memorandum to the United States Attorneys, reproduced in Department of Justice Press Release, April 6, 1959 (App. A-23). Under that policy, once State prosecution is initiated, related federal prosecution can only be brought for compelling reasons, after approval by the Assistant Attorney General in consultation with the Attorney General. Id. This policy has been called the "Petite Policy," after the first Supreme Court case vacating a judgment of conviction and dismissing an indictment on the Solicitor General's representation that the policy had been accidentally breached.[10] During the eighteen years of its existence, the Petite Policy has frequently been invoked by the Solicitor General to effect voluntary dismissal of charges which had been successfully prosecuted in the lower courts without the requisite authority. See cases collected in In re Washington, 531 F.2d 1297, 1303

---

10. Petite v. United States, 361 U.S. 529 (1960), actually involved successive federal prosecutions, but the Solicitor General recognized that "[t]he policy against multiple federal prosecutions is a fortiori to that against duplicating state-federal prosecutions...." Id., Motion to Vacate the Judgment and Dismiss the Indictment, 2.

(5th Cir. 1975), on rehearing, 544 F.2d 203 (5th Cir. 1976).[11]

A recent Petite Policy dismissal of charges in the Supreme Court is Watts v. United States, 422 U.S. 1032 (1975) (per curiam). Watts is particularly instructive because there, federal prosecution was instituted only after the state prosecution had been lost. The lesson of Watts is that the Justice Department applies the Petite Policy without respect to the success or failure of State prosecutions. As with the Double Jeopardy clause, its purpose is to prevent retrial, and not merely to prevent repunishment.

The Engel Affidavit (¶¶4,8) leaves no doubt that the Federal prosecutors viewed the State charges to be for substantially the same offenses. Their view was correct. Appellant and defendant Hicks were indicted by the Special Narcotics Grand Jury for conspiring to distribute heroin during a period that substantially overlaps the period specified in the Federal indictment. In a judicially noticeable decision, Justice Walter T. Gorman, sitting in New York County Part 107 of the Supreme Court of New York, recited that after learning Salena Hicks' first name, address and phone number, "[a]n eavesdropping warrant for her telephone was issued on January 11, 1974. The police heard a female, later verified to be Grace Simmons, on the Salena wire on January 13,

---

11. The bizarre result of the 7-6 Washington decision, even if proper on the peculiar facts of that case, is inapposite to this appeal. In contradistinction to Washington, the trial court here made no inquiries and received no assurances.

1974. During the existence of this tap, numerous additional conversations between her and Salena were recorded. As a result of the Salena tap, the law enforcement officials ascertained the full, name, address, and telephone number of Grace Simmons." People v. Simmons, No. N923-315/74 (May 24, 1976), as reprinted at page A33 of Appellant's Appendix to the appeal to the Appellate Division, First Department, from the suppression order.

Although appellant has no standing to independently invoke the Petite Policy,[12] she does have standing to assert that the prosecutor's apparent unilateral abrogation of that policy further evidences the bad faith motivation underlying the belated bringing of federal charges. Judicial evaluation of the prosecutor's motivation must be informed by the policies and instructions which guide the conduct of the U.S. Attorney's Office. When measured against the Petite Policy, the Engel Affidavit is tantamount to a candid concession: "the Government intentionally delayed. . . to harass" appellant. Marion, supra, 404 U.S. at 325. The remedy appropriate to these circumstances is the same as that prescribed in United States v. Roberts, 515 F.2d 642 (2d Cir. 1975) (dismissal for delay which precluded youthful offender treatment).

---

12. Of course, this Court might conserve its resources, and those of the United States Attorney's Office, by requesting appellee to clarify the United States' position before argument.

(B) Appellant Was Prejudiced At Trial By the Delay

The delays fashioned by the prosecutor in fact visited prejudice upon appellant's ability to defend the charges. Salena Hicks' loss of rational functions had at least four detrimental effects: directly exculpatory anticipated testimony was lost (Mitchell Reply Affidavit); testimony which would have undermined the credibility of Benny Johnson[13] was lost (id.); appellant was unduly burdened with testimony of Hicks' acts and statements, but could not obtain from Hicks an explanation of conduct or statements allegedly made outside appellant's presence;[14] and appellant was pressured into testifying as an unsatisfactory alternative to calling Hicks.[15]

Appellee will probably insist, as in the court below, that the government didn't know that Salena Hicks would lose all rational functions; in any event, the government didn't plan or cause her incompetency. But that misstates the issue. It is the fact of prejudice to the defense,

---

13. Johnson's credibility was also protected by the assistant's misleading questions. See Point III, infra.

14. Although the co-conspirator exceptions have survived all constitutional challenges, the prejudice contemplated by Marion need not independently be of constitutional magnitude. To hold otherwise would be to strip all meaning from the Marion Court's language, since prejudice of independent constitutional dimensions mandates reversal regardless of whether it flows from delays.

15. Appellant's testimony thrust open the barn door for extensive rebuttal.

coinciding with arbitrary or unreasonable delay, that under any reading of Marion commands dismissal.[16]

The government cannot be permitted to lightly jeopardize the paramount public interest in accurate fact-finding at fair trials. When it chooses to delay, the government necessarily risks the loss of key witnesses or evidence critical to either side. The relatively small magnitude and inherent unpredictability of the risks attending procrastination may not place a great burden on the government to justify its delays. But some slight justification must be apparent before it can be absolved of responsibility for any measurable loss of evidence through passage of time. In this case, important non-cumulative testimony was lost to the defense; no proper justification, however slight, exists for the tardy initiation of prosecution. Accordingly, appellant has sustained the prejudice contempated by Marion, and the court below erred in refusing to grant the motion to arrest judgment (T.557).

---

16. Surely when the Supreme Court spoke of prejudice to the defense flowing from government delay, it was not limiting relief to the hopefully purely hypothetical case in which the government has executed a necessary defense witness.

Point Three: Dismissal With Prejudice Is Required Because The Trial Assistant Knowingly Encouraged Her Leadoff Witness To Give False and Misleading Testimony Concerning His Arrangements With the Government.

The Engel Affidavit establishes that during 1974 and 1975, Benny Johnson had been in negotiations first with AUSA Kaufman, and then with AUSA Engel. It further establishes that Engel had specified an "arrangement" and that Johnson had voiced no dissatisfaction with that arrangement. This arrangement was confirmed in a meeting between Engel and Johnson on May 23, 1975. Subsequent events establish that the arrangement was fully honored by both the Government and by Johnson.

The trial assistant, AUSA Strauss, as a matter of law is charged with knowledge of the Kaufman-Johnson negotiations and the Engel-Johnson arrangement. Giglio v. United States, 405 U.S. 150 (1972) (unintentional concealment of prior prosecutor's promise to co-conspirator witness is reversible error).[17] Notwithstanding her knowledge of the history of negotiations and arrangements between the Government

---

17. Here, unlike the Giglio situation, it is inconceivable that she had no knowledge of the Engel-Johnson commerce. The Engel Affidavit appears to be the last addition to the prosecutor's file as of the date when Ms. Strauss "ha[d] been assigned responsibility for the prosecution of [this] case." Strauss Affidavit, ¶1 (App. A-13). Engel's Affidavit was executed on September 30, 1975, and avers that "[s]ince April 10, 1975, the case involving Simmons and Hicks has been assigned to the affiant herein." Engel Affidavit ¶5. Less than a month

and Johnson, Ms. Strauss sat by while Johnson swore that his agreement to testify was only reached subsequent to his guilty plea last month to one count of the indictment in this case. T.53-57; 64; 72-73. To strengthen Johnson's false claim, Ms. Strauss, on her second redirect, asked when the witness "had the first discussion with me about your testifying in this case?" T.73. This conveyed the erroneous impression that Johnson had negotiated only with Ms. Strauss.

Appellant's attorney sought to correct that false impression. But on recross, he had to take Johnson's absolute denial of ever having met AUSA "Ingall" [sic]. T.74. Thereafter, Johnson reluctantly conceded that he might have met with some other prosecutor besides Ms. Strauss, although he had no recollection of doing so. T.74-75.

Ms. Strauss could not tolerate such an admission of uncertainty going to the jury. Taking a third redirect, Ms. Strauss led the witness and misled the jury, by eliciting testimony that October 12, 1976 was the first time Johnson "ever came down to the U.S. Attorney's Office and gave any information about any narcotics activities." T.75. To frost her mischievous cake, she followed up by having Johnson assert he had never testified to the Grand Jury (id.). She thus gave the jury seeming corroboration

---

later, Ms. Strauss executed her affidavit. Both affidavits were in opposition to the same motion. There being absolutely no substantive overlap in their contents, it is inconceivable that the author of the later affidavit was oblivious to the contents of the prior affidavit.

of the claim of no pre-indictment agreement. She knew, from the Engel Affidavit, that the Johnson-Engel agreement included an understanding that Johnson would not testify in the contemplated grand jury inquiry into this case.

Ms. Strauss was not content to rest her case on the false and misleading testimony of Johnson. In closing, she had the stupendous cheek to argue not merely that Johnson's false testimony was true, but that it was appellant's attorney who sought to mislead the jury!

> Mr. Mitchell mentioned to you at the beginning of the summation that Benny Johnson, his explanation for why Benny Johnson would lie, is that he was scrambling after his plea in his first case because he was facing 60 years. That statement by Mr. Mitchell we would submit is simply not supported in the record. Go back and look at the testimony of Benny Johnson. He said he didn't enter into any deal with the government until after the plea in this very case, after he was indicted and pled guilty, and we offered into evidence Government's Exhibit 6, a letter dated October 13, 1976; just in the last two weeks, Benny Johnson made a deal with the government.
>
> Mr. Mitchell knows full well that Benny Johnson was not scrambling for the last year and a half or so after entering a plea in that first case because he was facing 60 years. It was only after he pled guilty in this case that he made the decision that he wanted to cooperate and testify. [T.459-60].

When a conviction has been obtained after false testimony which might have affected the verdict, it must be set aside. Giglio v. United States, 405 U.S. 150 (1972):

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known

> false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213 (1942). In Napue v. Illinois, 360 U.S. 264 (1959), we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., at 269. Thereafter, Brady v. Maryland, 373 U.S. at 87, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function §3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 71. [Id., 405 U.S. at 153-54].

In short, "The dignity of the United States Government will not permit the conviction of any person on tainted testimony." Mesarosh v. United States, 352 U.S. 1, 9 (1956).

Benny Johnson's credibility was essential to the prosecution case. Benny Johnson lied. The prosecutor knew he lied. Instead of correcting the record, she asked leading questions designed to reinforce the false picture painted by his lies. Then the prosecutor with unmitigated gall argued to the jury that appellant's attorney was trying to mislead it when he vainly sought to expose Johnson's fabrications.

The authorities cited above command a singular response to this prosecutor's dismal performance: reversal of the conviction and dismissal of the charges.

Point Four: Because the 'Chains of Custody' Over the Three Narcotics Exhibits Were Missing So Many Links, The Exhibits Were Inadmissible.

The leading case in this Circuit on "chain of custody" is United States v. S.B. Penick & Co., 136 F.2d 413 (2d Cir. 1943). There, the late Judge Swan wrote:

> [B]efore a physical object connected with the commission of a crime can properly be admitted in evidence, there must be a showing that such object is in substantially the same condition as when the crime was committed. 2 Wharton, Criminal Evid., 11th Ed., §757. But there is no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with. See Lestico v. Kuehner, 204 Minn. 125, 283 N.W. 122, 125. In each case the trial judge before he admits it in evidence must be satisfied that in reasonable probability the article has not been changed in important respects. Wigmore, Evidence, 3d Ed., §437(1); 32 C.J.S., Evidence, §607. In reaching his conclusion he must be guided by the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. [Id. at 415]

More recently, in United States v. Johnson, 513 F.2d 819 (2d Cir. 1975), the Government failed to account for its safekeeping of a narcotics exhibit that lost 40% of its weight between the times of seizure and of laboratory analysis. Judge Anderson sternly admonished: "It behooves the Government in the future to show greater care both in its handling of seized contraband and in its chain of custody proof at trial." Id. at 822 n.1. It is against the Penick requirements and the quoted Johnson admonition, that the

chains of custody in this case must be measured.

The prosecution introduced over vigorous objection three exhibits, GX-1, -2 and -3, upon which Counts II, III and IV, respectively, were to be proved. The net weights of the powder constituting these exhibits were 20.53 grams, 21.24 grams and 36.19 grams, respectively. T.232.[18] The chains of custody over each exhibit, between the time of alleged purchase[19] and the time Mr. Manning began his analysis, are unique.

(A) The Chain of Custody Over GX-1.

Around October 17, 1973, William Brown phoned (T.44) or visited (T.85) Benny Johnson, wanting to buy an ounce of heroin. In response, and after some travel and delay, appellant allegedly gave Brown a package. T.90.

> Q I show you what's been marked as Government's Exhibit 1 for identification. Does that appear to be the package of narcotics that --
>
> MR. MITCHELL: Objection. This is not narcotics at this point.
>
> THE COURT: Sustained. Rephrase the question.
>
> Q Does that appear to be the package the defendant Grace Simmons gave you that evening as you just described to the jury?
>
> A Yes, it looks like it. [T.90]

---

18. There are 28.349 grams to the ounce.

19. Since Brown was not under surveillance when he received GX-1 and GX-2, the source of these exhibits, in the absence of a defective chain of custody, was a pure credibility issue resolved by the jury against appellant.

"Later on that evening," testified DEA Agent Grant, "I met with Brown away from that area, and he surrendered an ounce of heroin to me at that time." T.178.

Q Showing you Government's Exhibit 1 for identification, is that the package of heroin you were given by Brown that evening?

A Yes, it is.

Q Did you maintain custody of it and deliver it to the lab?

A Yes. The following day it was delivered to the lab.

MS. STRAUSS: The government offers Exhibit 1.

MR. MITCHELL: The same objection.

MS. STRAUSS: I don't see any need for a subject to connection on this exhibit.

THE COURT: I agree. It may be marked. [T.181-82]

With that ruling, the trial court found an adequate chain of custody, although there was no testimony as to whether GX-1 was sealed, or when, or by whom; and there was no identification of the individuals who delivered it to, or received it at, the lab. Nonetheless, the record at trial contains only one additional link in the chain of custody: Mr. Manning's later testimony respecting his analysis of GX-1. T.231-33.

(B) The Chain of Custody Over GX-2.

With Benny Johnson's blessings (T.45), on December 5, 1973 William Brown gave Salena Hicks $1,200 (T.94) for an ounce of heroin (T.45). Brown had come accompanied by DEA Agent Gordon, but Gordon remained in the bar next door while the buy

was being made. T.96.

Q I show you Government's Exhibit 2 for identification. Does this look like the package that Salena gave to you that evening?

A It looks like it.

Q Mr. Brown, what did you do next?

A * * *

I walked out and went back to the bar next door where the agent was and I told him, "Let's go. I got the package."

So me and the agent got in my car and we drove back to 125th Street and the river, and we met the other agents there also, you know.

Q What happened then?

A They took the package * * * [T.97].

Contrary to Brown's account, Agent Gordon testified that upon returning to the bar, Brown gave him "a package that contained approximately one ounce of white powder." T.158.

A After he gave me the package, two or three minutes later we left, we went to a prearranged location where we met the surveillance agent and I turned the package over to Agent Grant.

Q Showing you what's been marked as Government's Exhibit 2 for identification, is that the package that Brown gave you that night and that you later turned over to Agent Grant?

A Yes, this is the package.

Q How do you identify it, sir?

A Because of my initials on the package itself.

Q Is it dated as well?

A Yes.

MR. STRAUSS [sic]: The government offers Exhibit 2.

MR. MITCHELL: I object to it, if it please the Court.

THE COURT: I will take it subject to further connection. [T.158]

Agent Grant testified that on December 5, 1975 (T.182), he "received another quantity of heroin from Agent Gordon. I returned to 57th Street [DEA headquarters] and the next day turned that package over to the lab." T.183-84.

The court had absolutely no knowledge of any security precautions undertaken by the DEA agents, of where and how Agent Grant stored the package, or the number of packages Grant may have seized and identified that day. Nonetheless, after Manning testified to his laboratory findings (T.231-33), the court presumed sufficient connection to unconditionally admit GX-2. T.233-34.

(C) The Chain of Custody over GX-3.

Undercover DEA Agent Gordon on January 17, 1974 met Benny Johnson with a view to buying two ounces of heroin. T.159. They proceeded from Singleton's to another den of iniquity, where Gordon paid Johnson $2,400 after Salena Hicks had placed a package in an ashtray at the other end of the bar. Then Gordon retrieved the package. T.160-61.

Gordon testified:

> * * * I left the area and I met with the survilling [sic] agent where the package was field tested.
>
> Q What were the results of that field test?
>
> A Field test was positive.

Q What did you do with the package thereafter?

A I took the package down to the DEA office where I put it in a lock sealed envelope and put it in some overnight vault. The next day I removed the package and turned it over to the DEA laboratory.

Q Showing you what's been marked as Government Exhibit 3 for identification, can you identify that as the package that you received from Salena Hicks that night?

A Yes.

MS. STRAUSS: The government offers Exhibit 3.

MR. MITCHELL: The same objection.

THE COURT: The same ruling.

(Government's Exhibit 3 received in evidence.) [T.161-62]

The Court had no knowledge of the nature of the field test or the person who performed it. The Court had no knowledge of the security provided by "some" overnight vault. The Court had no knowledge of the person who received it at the lab, or the storage conditions in the lab prior to testing. The Court had absolutely no knowledge of the basis for Gordon's identifying GX-3 as the package he purchased. Only later, when the chemist testified (T.231-33), did the Court have evidence that the package tested in the lab contained less than two-thirds the expected weight. But Judge Palmieri deemed this additional evidence sufficient to satisfy the condition subsequent prescribed when GX-3 was admitted. T.233-34.

(D) Application of the Penick Criteria.

The court below knew next to nothing of "the circumstances surrounding preservation and custody [or] the likelihood of tampering." Penick, supra, 136 F.2d at 415. The "nature of the article[s]" (id.) precluded identification by mere inspection. Thus, in contradistinction to the Penick circumstances, there was no rational basis upon which the trial judge could "be satisfied that in reasonable probability" (id.) any of the exhibits was substantially the same powder purchased by Brown or Gordon.

The trial court should have required "a substantially more elaborate foundation. . .with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with." E.W. Cleary, McCormick on Evidence, §212 at 527-28 (2d edition 1972).

The missing links in the chains of custody were very substantial. The exhibits lacked uniqueness of identity. Their weights shrank significantly after their purported purchase. Penick precluded their admissibility.

With their exclusion, the three substantive charges must be dismissed, for there remains no proof that the purchased powders were federally proscribed. Likewise, the conspiracy charge must fall. The hypothesis of guilt finds no more support in the admissible evidence than does the hypothesis that the conspirators sought to defraud, e.g., by misrepresenting salt to be heroin. No authority need be cited for the

proposition that reasonable doubt necessarily exists when the evidence is equally consistent with innocence as with guilt.[20]

CONCLUSION

For each of the foregoing reasons, the judgment of conviction and sentence should be vacated, and the case remanded with instructions to dismiss the indictment.

Respectfully submitted,

AARON J. JAFFE

Attorney for Appellant

401 Broadway
New York, New York 10013
(212) 966-6790

On the Brief:
FREDRIC J. GROSS

---

20. In any event, the evidence improperly admitted on the substantive counts and in support of Overt Acts (5) and (6) of the Conspiracy Count cannot be deemed harmless to the conspiracy verdict.